IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1114 OF 1996

1.M/s. Bombay Chemicals Limited,
a Company having one of its
factory at 275, Patlipada,
Ghodbunder Road,
Thane 400 607 and Registered
Office at 129, Mahatma Gandhi
Road, Bombay- 400 023

2. Shri Govind Dattatraya Gokhale, Indian
Inhabitant of Bombay, residing at 18,
Swami Gyanchand Marg, Dadar,
Bombay-400 014, one of the Shareholders and
Managing Director of the Petitioner
No.1 abovenamed. ...Petitioners.

V/s.

1. The Union of India;
2. Shri H.S.Sharma,
   Assistant Commissioner of Central Excise
   Division Thane IV, Central Excise Building,
   4th floor, Wagle Industrial Estate,
   Thane- 400 604.
   (who passed Order dated 12.10.1995)

3. Shri C.P.Goel,
   Assistant Commissioner of Central Excise,
   Division Thane IV, Central Excise Building,
   4th floor, Wagle Industrial Estate,
   Thane - 400 604.
   (Who has passed Order dated 22.3.1995) ..Respondents.

Mr. Jimmy Pochkanwalla with Sunita J. Masani with
Mr.Amit Jajoo M/s.N.C.Dalal & Co. for the Petitioner.

Mr.R.V.Desai, Sr.Counsel with Mr.S.M.Shah and with
Mr.A.S.Rao for the Respondent.

CORAM: DR.S.RADHAKRISHNAN
& J.H.BHATIA,JJ.

DATED: 20th July, 2005.

JUDGMENT: (Per J.H.Bhatia,J.)

1. To state in brief the Petitioners are the holder of Central Excise Registration for the manufacture of "Toys, Brand Mosquito Coils" (the Product in brief) . According to them, the Product comes within the definition of insecticides, classified under Tariff Item No.68 and is eligible for exemption under Notification No.55/75 dated 1.3.75 as amended by Notification No.62/78 upto 31st October, 1982 and was exempted from 1.11.82 to 28.2.86 under Notification 234/82 dated 1.11.82. The product is classified under Chapter subheading No.3808.10 of Schedule to the Central Excise Tariff Act, 1985 and is chargeable to 'NIL' rate of duty, upto 28.2.1994. The Assistant Collector Central Excise allowed the exemption but the Collector Central Excise (Appeals) disallowed the exemption. That order was challenged before the CEGAT by the Petitioners and Special Bench of the CEGAT by an order dated 19th March, 1990 held that the product is 'insecticide'. The Department preferred an Appeal No.4817/90 before Hon'ble Supreme Court challenging the order of the CEGAT. The Appeal was dismissed by the Supreme Court by an order dated 28.2.94. Therefore, it is no more in dispute that the product is 'insecticide' and is exempted from excise duty.

2. The Petitioners submitted 15 refund claims for

different periods from 27th September 1979 to 28th February,1994 for different amounts paid towards the excise duty from time to time as required by the department. Total claim is for Rs.13,17,34,703.65. The Petitioners contended that personal hearing was given by the Respondent Nos.3-C.P.Goel, the then Assistant Collector (Excise) to the Petitioners and they were also represented by their counsels. After hearing the Petitioners and the representative of the Department, the then Assistant Collector (Excise) passed an order dated 22nd March, 1995 whereby he sanctioned refund claim of Rs.67,79,284.95 for the duty paid during 27th September, 1979 to 31st December, 1983 to the Petitioners on the ground that he had not passed over the said liability to the customers. He came to conclusion that the duty paid by the Petitioners from 1.1.84 to 28.2.94 was actually passed over to the customers, and therefore, though the amount of Rs.10,43,41,863 is liable to be refunded, it could not be paid to the Petitioners but was liable to be credited to the Consumer Welfare Fund established under section 12C.

3. It is contended that the order of the Assistant Collector passed on 22nd March,1995 had become final and if department was aggrieved by the same, it could

challenge the same by way of an Appeal Revision. But no such procedure was adopted and the then Assistant Collector-Respondent No.2 passed the impugned order dated 12th October, 1995 without giving an opportunity of hearing to the Petitioners and reversed the earlier order of Assistant Collector, the Respondent No.3. In this Writ Petition, the Petitioners seek declaration that the order dated 12th October, 1995 is Non-est, illegal and bad in law and direction to quash and set aside the same. The Petitioners also seek declaration that the order dated 22nd March, 1995 passed by the Respondent No.3 is proper, legal and binding on the Central Excise Department. The Petitioners also seek direction to the Respondent No.1 to forthwith make payment of refund claim as per the order dated 22.3.95 with interest at such rate as this Court may deem fit and proper. In alternate, the Petitioners claim entire refund of Rs.13,17,34,703.65 with interest.

4. The Respondent No.2- H.S.Sharma, the Assistant Commissioner, who had passed the impugned order dated 12.10.95, filed an affidavit on behalf of the Respondents to contest the Writ Petition. It is contended by the Respondents that so called order dated 22.3.95 passed by the Respondent No.3, C.P.Goyal was infact a draft order which was submitted for pre-audit

before passing the final order. However, during the pre-audit, it was found that the Petitioners are not entitled to claim any refund because even for the period from 27th September, 1979 to 31st December, 1983, they had actually passed over the liability of excise duty to the customers. As the product was exempted from levy of the duty, and the incidence of the duty was passed on to the customers the amount could be refunded only by credit to the Consumer Welfare Fund. It is contended that alleged order dated 22nd March, 1995 was infact never passed nor it was communicated to the Petitioners and unless, the order is communicated to the Petitioners, there are not entitled to claim any benefit out of the same. It is also contended that as the said order was not communicated to the Petitioners by the Department nor the Petitioners have disclosed the source from where they have come to know about the said order, they are not entitled to any relief from this Court on the basis of alleged order dated 22nd March, 1995. According to the Respondents, the Petition is devoid of any merit and is liable to be dismissed.

5. Heard learned counsels for both the parties. We also called original record for our perusal.

6. Admittedly from 1979, the Petitioners had claimed

that their product is exempted from excise duty and they had also made some payments under protest from 24.9.79 onwards. There was a long drawn litigation before the different fora as to whether the said product was exempted from excise levy or not. By the order dated 19th March, 1990 , the Special Bench of CEGAT allowed the Appeal of Petitioners holding that the product is insecticides and is exempted from excise duty. Appeal of the department against the said order was dismissed by the Supreme Court on 28.2.94. Therefore, now there is no dispute that the amount of Rs.13,17,34,703.65 recovered from the Petitioners towards excise duty from 27th September, 1979 to 28th February, 1984 is liable to be refunded. However, it is also not in dispute that if incidence of the duty has been passed on by the assessee to the customers then it is not entitled to claim that amount on the doctrine of Unjust Enrichment . The Union Government has established Consumer Welfare Fund under section 12C of the Central Excise Act and the refund amount is to be credited to the said Consumer Welfare Fund if incidence of the duty is passed over to the customers. However if incidence of the duty is not passed on to the customers by the assessee, the amount is payable to the assessee.

7. Even though the Respondents denied that alleged

order dated 22nd March, 1995 was passed by the Respondent No.3, the then Assistant Collector, the Petitioner produced xerox copy of that order which purports to bear signature of the Respondent No.3-C.P.Goel, the then Assistant Collector (Appeals). In that order, there is noting that file be sent for pre-audit to the Assistant Collector (Audit) alongwith all the remaining records. That noting is also signed by C.P.Goel. As authencity of that copy was challenged by the Respondents, we had to direct the department to produce the original record. On careful perusal of the record, we find that the copy produced before the Court is infact a true xerox copy of the original order which is in the office record. Hence, the source from which the Petitioners got the copy is immaterial. The contention of the Respondents is that the said order dated 22nd March, 1995 was not an order in real sense and could not be effective because it was sent for pre-audit and only after clearance by the Assistant Collector (Audit) final order could be passed by the Assistant Collector and on communication of that order it would be effective. Mr.Pochkanwalla , the learned counsel for the Petitioners, vehemently contended that the proceedings for determination of refund claim are quasi judicial and therefore, the competent authority, that is, Assistant Collector has to pass the order

without any external control. He also contended that once the Respondent No.3, who was the competent authority, heard the parties and after going through the record, had passed the order on 22nd March, 1995, the said order was final, effective and binding on the parties. Communication of the said order to the Petitioners was irrelevant. He further contended that after the final order was passed, it could not be subject to the pre-audit by another officer of the Audit Department. According to him, such pre-audit after passing of the judicial order by the competent authority is not permissible under our judicial system and has to be ignored.

8. Record reveals that the said order dated 22.3.95 alongwith the complete record was submitted to the Assistant Commissioner (Audit) for pre-audit. Incidentally during the relevant period , the Respondent No.2-H.S.Sharma himself was the Assistant Commissioner (Audit) and after pre-audit of the said order and the record, he passed the impugned order dated 12th October, 1995. Admittedly, the Respondent No.2, H.S.Sharma had not heard the Petitioners or their counsel and without hearing them, he passed the impugned order and thereby, deprived the Petitioners of their rights conferred on them by the earlier order dated 22.3.95.

Mr.Pochkanwalla, the learned counsel for the Petitioners vehemently contended that the earlier order passed by the Respondent No.3 could be challenged by the Department by Appeal or Revision and could be reversed, set aside or modified by the Appellate or Revisional authority. The Respondent No.2 was not the Appellate or Revisional authority but was officer of the rank of the Respondent No.3. As the Department had not challenged the order dated 22.3.95 by filing revision or appeal, the said order became final and binding. The Respondent No.2 had no jurisdiction to pass any different order about the same subject and, therefore, the order dated 12th October, 1995 passed by him is non-est, illegal and of no effect. On the other hand, Mr.Desai, the learned senior counsel for the Respondents supported the impugned order on the ground that earlier order was not at all an order because it was subject to pre-audit and because final order was yet to be passed after pre-audit. He also contended that unless the order is communicated to the assessee it does not become final and binding.

9. It is not in dispute that proceedings before the Assistant Collector adjudicating the claim for refund of the excise duty are of quasi judicial nature. Relying upon its two earlier decisions in **Mahadayal v.**

Commercial Tax Officer (AIR 1958 SC 667) and Rajagopal Naidu v. State Transport Appellate Tribunal (AIR 1964 SC 1573), Their Lordships of the Supreme Court observed as follows in **Orient Paper Mills Ltd. v. Union of India (1978 (2) E.L.T.(J345) (S.C.) = AIR 1969 SC 48.**

> "If the power exercised by the Collector was a quasi judicial power- as we hold it to be- that power cannot be controlled by the directions issued by the Board. No authority however high placed can control the decision of a judicial or a quasi judicial authority. That is the essence of our judicial system. There is no provision in the Act empowering the Board to issue directions to the assessing authorities or the appellate authorities in the matter of deciding disputes between the persons who are called upon to pay duty and the department. It is true that the assessing authorities as well as the appellate authorities are judges in their own cause; yet when they are called upon to decide disputes arising under the Act they must act independently and impartially. They cannot be said to act independently if their judgment is controlled by the

> directions given by others. Then it is a misnomer to call their orders as their judgments, they would essentially be the judgments of the authority that gave the directions and which authority had given those judgments without hearing the aggrieved party."

10. Relying on the above observations, in a similar case in **Rewa Gases Pvt.Ltd. v. Assistant Collector of C.EX.,SATNA 2002 (140) E.L.T. 18 (M.P.)** , the Madhya Pradesh High Court has observed as follows:

> "It is not in dispute that the proceedings before the Assistant Collector for adjudicating the claim for refund of excise duty are of quasi judicial nature. He must act independently and impartially. His discretion cannot be controlled by the directions of the superiors in that very case. The procedure of pre-audit of such a judicial discretion is unheard of. It amounts to pulling the strings from the backdoor and renders the adjudicating officer as a puppet in the hands of others. The tax-collector is already considered as

leaning in favour of the administration and if his quasi judicial discretion is controlled by laying down the procedure of pre-audit justice to the assessee would be a casualty. The officer is bound by the statutory provisions and he must appreciate the evidence and material on record by using his own judgment. His attention can be invited to general principles and norms relevant for adjudication of the claim but there cannot be a direct or indirect interference in the case which he is handling. The Central Board or the Collector (Internal Audit) has no jurisdiction or authority to direct an officer to exercise his discretion in a particular way. The discretion is vested in the adjudicating officer. While the adjudicating officer performs the statutory or particularly quasi the judicial duty, the superior authorities cannot direct that the discretion should be exercised one way or the other. The adjudicating officer must consider the case independently, uninfluenced by the departmental instructions, on the basis of evidence brought before him and also on the

> basis of all the facts placed before him. The officer is not bound by any administrative instructions. The questions of fact and law, which may be raised before him are required to be determined by him after full application of mind in an objective manner without feeling in any way controlled by any administrative instructions.

From the aforesaid two authorities of the Supreme Court and Madhya Pradesh High Court, it is clear that the authority exercising quasi judicial power has to discharge his function judicially, independently and without any control or interference. According to the Respondents, in view of certain standing orders and the circular dated 13th September, 1990 from Central Board of Excise and Customs after the Assistant Collector prepares the order, he has to submit the same to audit cell for pre-audit and after the pre-audit, the concerned Assistant Collector should pass the final order accordingly. Infact, it amounts to direct interference in the judicial order passed by the competent authority in the quasi judicial proceedings by some officers of the audit cell and thus such officer of

the audit department controls the final decision of the authority vested with quasi judicial power. It cannot be supported in view of the observations of the Supreme Court in Orient Paper Mills v. Union of India (Supra).

11. It is possible that before passing final order in the proceedings for refund claim, the concerned Assistant Collector may get the record about the payment of duty, about the passing on of the incidence of the duty to the customer or otherwise verified from his office or even from the Accounts or Audit Department. But if after being satisfied that claim is justified, he passes the order, it becomes final. Thereafter, there can not be any pre-audit of the order passed by the Assistant Collector.

12. On careful perusal of the original record, we find that the concerned officers made the notings on the basis of claim and the office record. Not only this before passing the impugned order dated 22nd March, 95, the Respondent No.3-C.P.Goel had directed that file be submitted to the Additional Director (Cost) to ascertain whether the assessee had charged and recovered the element of duty from their customers for the period from 27/9/79 to 31/12/83 and as per his directions, the file was infact submitted to Additional Director (Costs).

The Office Note dated 24.01.1995 reveals that the file was returned by Additional Director (Costs) with the following remarks:

> **"It appears from the examination of the above said records that the assessee had not charged and recovered excise duty from the customers during the period from 27.9.79 to 31.12.83 "**

After perusal of the said noting and some other notings in the file , the Respondent No.3-C.P.Goel passed the impugned order dated 22.3.95. It is material to note that in the office record, there are two sets of the said order. Both bear signatures of the Respondent No.3-C.P.Goel. One set is immediately after the aforesaid noting in the beginning of the record and another set is to be found from page no.367 to 389. On the second set after his signature, below the order, there is endorsement about forwarding the copy to the Assistant Collector (Review) Superintendent Range, Hand file, Master file and Spare. Below that there is no mention that this order was to be submitted for pre-audit. However, on the first set of order, which is found immediately after the notings referred above, below the signature of the Respondent No.3, there is

handwritten note that the file may be sent for pre-audit to the Assistant Collector (Audit) alongwith all the relevant records and it is also signed by the Respondent No.3 on 22.3.95. This appears to be in view of the departmental standing instructions and the circular.

13. Admittedly, copy of this order was not served on the Petitioners nor the order was communicated to them. Mr.Desai, the learned counsel for the Respondent contended that the unless the order was actually communicated, it could not be final nor it could be binding. He contended that in the Government Departments , it is common practice that the notes are prepared, signed and put up for approval of the higher authorities and only after the notes are finally approved , orders are issued and communicated to the parties and only then order becomes effective. According to him, in view of this practice, order passed by the Respondent No.3 was infact not order but office note which was forwarded for pre-audit, and, thereafter, the Respondent No.2 passed the final order and it was communicated to the Petitioners. On behalf of the Respondent, reliance was placed on **Bachitter Singh v. State of Punjab AIR 1963 SC 395** wherein minister had made a noting on the file but no order formally in the name of Governor was issued or communicated to the

person concerned. In that context, it was held that mere noting of the minister did not amount to making an order as it could be reconsidered by the counsel of the ministers. It is true that in the Government Departments files move upwards with the notes made by the officers at the different levels for approval. Sometimes even after approval, on reconsideration, orders are not actually issued and communicated to the concerned. In the Government Departments policy and administrative decisions are taken which may always be reconsidered and changed. Even a decision taken by the minister heading the Department, may be reconsidered by the Cabinet taking into consideration all the pros and cons of the matter. Not only this, sometimes even cabinet decisions, are reconsidered. Therefore, merely because certain notings are approved at certain levels in the Government, it can not be said that the order is passed. Only after the formal orders are issued for information of public or communicated to the concerned party, such orders become final and binding.

14. However, practice followed in the Government Departments in the administrative or policy matters cannot be applicable to the judicial or quasi judicial proceedings. An authority exercising judicial powers or

quasi judicial powers has to adjudicate the matter before him independently, impartially and without any external interference or control. If the decision of such judicial authority depends on some external pressure or control, the decisions cannot be taken impartially without fear or favour. The external control or interference in the decision making process of judicial authority is totally unknown to the judicial system of this country. The judicial or quasi judicial order becomes final, binding and effective as soon as it is made or passed. It's finality is subject to Appeal or Revision only and it is not dependent on communication of the order to the concerned party. In **Cosmic Radio v. Union of India & Another 1983 E.L.T.84 (Bom.)** almost on similar facts, the learned Single Judge of this Court made following observations:

> "The communication of the order passed by Mr.Kullarwar is merely an administrative act and the failure of the respondents to inform passing of such order would not take away the effect of the order of Mr.Kullarwar. The mere fact that the order was never communicated to the petitioners is no ground to hold that the order of Mr.Kullarwar is not in existence. The order passed by the

> Assistant Collector of Central Excise comes into operation as soon as the same is signed and is not made dependant upon the communication of the same to the concerned party. In my judgment the stand taken by the successor of Mr.Kullarwar is totally erroneous and his action in issuing fresh show cause notice to the petitioners and calling upon them to re-agitate the matter before him is contrary to the provisions of the law".

We fully agree with the above observations. We are also supported by Supreme Court authority in **Collector of Central Excises v. M.M.Rubber Company 1991 (55) E.L.T. 289 (S.C.).** The Supreme Court held that order or decision of the authority comes into force or order becomes operative or effect becomes effective on and from the date when it is signed by him.

15. In view of this legal position, we hold that the authority in **Bachittersingh** is of no help to the Respondents. The order dated 22nd January, 1995 became final, binding and effective as soon as it was signed by the Respondent No.3. The pre-audit after that was

totally illegal and unauthorised. The Respondent No.2 was totally wrong in passing the impugned order on 12.10.1995. Therefore, the said order will have to be treated as without jurisdiction and non-est and is liable to be quashed. The order passed by the Respondent No.3 on 22nd March, 1995 will have to be restored. The Petitioners would be entitled to recover payment of refund of amount of Rs.67,79,285.94 on the basis of order dated 22nd March, 1994. However, due to illegal impugned order passed by the Respondent No.2 they were deprived of the payment and they were pushed to the further litigation. Therefore, in our considered opinion, the Petitioners should be entitled to recover the said amount with interest at the rate of 9% p.a.

16. In the result, the Writ Petition succeeds and the rule is made absolute in terms of prayer clause (a), (b) and (c). The Respondent No.1 shall make the payment of amount of Rs.67,79,285.94 to the Petitioners with interest at the rate of 9% p.a. from 22nd March, 1995 till the date of payment. Payment shall be made within four weeks from this date. No order as to costs.

(DR.S.RADHAKRISHNAN,J.)

(J.H.BHATIA, J.)

On behalf of the Respondent, reliance was placed on **Bachitter Singh v. State of Punjab AIR 1963 SC 395** wherein minister had made a noting on the file but no order formally in the name of Governor was issued or communicated to the person concerned. In that context, it was held that mere noting of the minister did not amount to making an order as it could be reconsidered by the counsel of the ministers.

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